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No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, AND UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF KANSAS AND DELAWARE *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of the *amici curiae* States of Kansas and Delaware. The *amici curiae* States support a finding by the United States Supreme Court in favor of Respondents on a limited basis.

In this brief, the *amici curiae* advocate that Congress validly abrogated the various states' Eleventh Amendment sovereign immunity when it enacted Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 ("ADA"). However, the *amici curiae* also advocate that Congress abrogated Eleventh Amendment immunity protection relative to Title II of the ADA *only to the extent said immunity obstructs the pursuit or enforcement of fundamental due process rights*. Moreover, the *amici curiae* advocate that Congress did not validly abrogate the states' Eleventh Amendment immunity protection as to equal protection-based claims under Title II because doing so would *not* have been a "congruent and proportional" remedy, would have overstepped Congress' enforcement powers, and would have been in direct conflict with long-standing constitutional mandates.

The *amici curiae* recognize that fundamental due process-based rights such as access to the courts, voting, and privacy issues, represent crucial and historically significant rights. The *amici curiae* also recognize that the states should be leading the fight to eliminate discrimination against persons with disabilities as to the exercise of their fundamental rights. Therefore, in order to encourage full pursuit and protection of fundamental rights, the states should not be immune from damage claims brought

by individuals under Title II of the ADA for violations that implicate a citizen's fundamental due process rights.

SUMMARY OF THE ARGUMENT

This Court has recognized that people with disabilities suffer discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712 (1985); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123 (1987). Unfortunately, people with disabilities have suffered discrimination in areas that directly affect fundamental due process rights. *See Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) and the instant case *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003). These fundamental rights are "deeply rooted in this Nation's history and tradition." *See Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2267-68 (1997) (*quoting Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938 (1977)). As such, it is imperative that the states strive to eliminate discrimination that affects these fundamental rights. One way of doing so is to recognize the fact that Congress validly abrogated the states' Eleventh Amendment immunity, in terms of these fundamental rights, when it enacted Title II of the ADA.

It is clear that Congress, when enacting the ADA, held numerous hearings and documented the past history of discrimination against disabled persons, including significant testimony in the legislative record regarding infringement of fundamental rights. It is also clear that, in addition to hearing testimony and gathering evidence

related to infringement of fundamental rights, Congress also heard testimony and gathered evidence related to equal protection-based concerns.

While any discrimination exhibited against a class of persons is abhorrent, Congress does not have the authority, as Respondents and certain *amici* suggest, to create new suspect or quasi-suspect classes in order to address equal protection-based concerns like those reviewed and documented in the legislative record during passage of the ADA. However, Congress does have the authority to address barriers or discrimination affecting fundamental rights due to the heightened scrutiny attributed to fundamental rights.

In enacting Title II, Congress provided for a congruent and proportional remedy for widespread constitutional violations by the states in terms of fundamental rights. It is clear that Congress initiated Title II legislation to remedy and deter continued discrimination against people with disabilities with respect to governmental functions in the area of fundamental rights. Accordingly, as limited to these fundamental rights, Title II was a valid exercise of Congress' Section 5 power.

In enacting Title II, Congress did not go so far as enacting the same congruent and proportional legislative remedies when equal protection-based purposes are concerned. This is so, because any attempt to do so would have exceeded Congress' enforcement powers – essentially carving out a new protected class of persons – and would have been in direct violation of the Constitution. *See Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002).

ARGUMENT

I. Fundamental Rights Under The Due Process Clause Are Distinguishable From Equal Protection-Based Concerns And Are Entitled To Greater Protections From Interference By Government, Including A Protection Against Application Of Eleventh Amendment Immunity.

Fundamental rights under the Due Process clause, as documented in the legislative record during passage of the ADA, are distinguishable from equal protection-based concerns documented in the same record.

This Court has "long recognized that the Fourteenth Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.'" *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267 (1997)). The Due Process Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*; *see also Reno v. Flores*, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 1447 (1993). Statutes affecting fundamental constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives; if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state must choose the least restrictive means. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982), *reh'g denied*, 458 U.S. 1131 (1982).

In determining whether a particular state law infringes on a fundamental right or interest so as to require strict judicial scrutiny, the United States Supreme Court

does not pick out particular human activities or conduct, characterize them as "fundamental," and give them added protection, rather, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31, 93 S.Ct. 1278, 1296 (1973), *reh'g denied*, 411 U.S. 959 (1973). The equal protection clause "creates no substantive rights," but rather, "it embodies general rule that states must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 2297 (1997). This Court has also confirmed "the long-settled principle that it is the responsibility of the Court, not Congress, to define the substance of constitutional guarantees." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365, 121 S.Ct. 955, 963 (2001) (*citing City of Boerne v. Flores*, 521 U.S. 507, 519-24, 117 S.Ct. 2157, 2163-67 (1997)).

The *amici curiae* advocate that fundamental rights that must be protected by eliminating the States' application of Eleventh Amendment Immunity include: **the right to vote** *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S.Ct. 1362, 1381 (1964); **access to the courts** *Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct 780, 786-87 (1971); **certain privacy rights**, including the right of **procreation** *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110 (1942), and the **right to marry** *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673 (1978); and **interstate travel** *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076 (1974).

Violations of these fundamental rights, including acts of discrimination affecting these fundamental rights, must be eliminated. That is exactly what Congress attempted to

do when it enacted Title II of the ADA and validly abrogated the States' Eleventh Amendment immunity as to fundamental rights.

II. Congress Found Ample Evidence Of A Problem Of Unconstitutional Treatment Of Individuals With Disabilities, Specifically As To The Exercise Of Fundamental Rights, And, Therefore, When Enacting Title II Of The ADA, Validly Abrogated The States' Eleventh Amendment Immunity As To Fundamental Rights.

Congress engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities and set forth in the legislative record a history of discrimination against disabled persons as to their fundamental rights.[1]

[1] Congress held 13 hearings devoted specifically to consideration of the Disabilities Act. *See Garrett*, 531 U.S. at 389-90 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. *See* Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (1990) (Task Force Report). The Task Force presented evidence to Congress submitted by nearly 5,000 individuals documenting the problems with discrimination persons with disabilities face daily – often at the hands of state and local governments. *See* 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act 1040 (Comm. Print 1990) (Leg. Hist.). *See also* Task Force Report 16. The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 Leg. Hist. 1324-25, as part of the official legislative history of the Disabilities Act. *See id.* at 1336, 1389. In *Garrett*, the United

(Continued on following page)

A. Historic and Enduring Discrimination of Fundamental Rights

Numerous States have restricted the rights of physically disabled people tc enter into contracts. United States Civil Rights Comm'n Accommodating the Spectrum of Individual Abilities (Spectrum) 40. Until 1977, the State of Kansas prevented marriage between developmentally disabled persons. *See* K.S.A. 23-120.

Amazingly, some cities enacted "ugly laws," that prohibited the physically disabled from appearing in public. M. Burgdorf & R. Burgdorf, A History of Unequal Treatment, 15 Santa Clara lawyer 855, 863 (1974). Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Id. (*quoting* ordinance).

Additionally, until 1968, the State of Kansas required a disabled person to provide a doctor's note or statement if that person could not register to vote in person. *See* K.S.A. 25-1234.

States lodged with the Clerk a complete set of those submissions. *See* 531 U.S. at 391-424 (Breyer, J., dissenting).

The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s – well within the lifetime of many current governmental decision makers. P. Reilly, The Surgical Solution 2, 148 (1991) (Reilly); National Public Radio, Look Back at Oregon's History of Sterilizing Residents of State Institutions (Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. Spectrum 37; *see also Stump v. Sparkman*, 435 U.S. 349, 351, 98 S.Ct. 1099 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl); Reilly at 148-60.

Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, Proclamation of Human Rights Day and Apology for Oregon's Forced Sterilization (Dec. 2, 2002). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). New Mexico recently reaffirmed its unqualified exclusion of "idiots [and] insane persons" from voting. New Mexico, Official 2002 General Election Results by Office (Dec. 2002).

It is evident from the legislative record that Congress discerned a substantial risk that persons with disabilities will be unconstitutionally denied the opportunity to exercise fundamental rights. Therefore, the *amici curiae* advocate that the enactment of Title II abrogated the States' sovereign immunity regarding fundamental rights.

B. Access to the Courts

The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980); *see also Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct 780, 786-87 (1971). Yet Congress learned that "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 Legislative History of the Americans with Disabilities Act (Leg. Hist.) 936 (Sen. Harkin).

> "I went to the courtroom one day and *** I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who *** told me there was an entrance at the back door for the handicapped people. *** I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. *** This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. *** And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. *** The employees of the courtroom came back to me and told me, 'You are not the norm. You are not the normal person we see every day.'"

Id. at 1070-1071 (Emeka Nwojke).

Such differential treatment affects not only the ability to get into the courthouse, but also the ability to be heard and participate effectively and meaningfully in judicial proceedings. For instance, in this case, Respondent Lane was summoned to appear at the Polk County Courthouse in Benton, Tennessee. *Lane v. Tennessee*, 315 F.3d 680 (6th

Cir. 2003) (No. 98-6730). All court proceedings in that courthouse took place on the second floor. *Id.* At his first appearance, Lane crawled up the stairs to the courtroom where he was arraigned and ordered to appear at a later date for his hearing. *Id.* Lane returned for the hearing, but refused to climb to the courtroom and refused to be carried by officers. *Id.* The court then ordered Lane's arrest and he was jailed. *Id.* Such egregious intrusion on a person's fundamental rights should not be protected under the guise of Eleventh Amendment immunity.

C. Voting

This Court has stated that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S.Ct. 1362, 1381 (1964); *Evans v. Cornman*, 398 U.S. 419, 422, 90 S.Ct. 1752, 1755 (1970) ("moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges" *citing Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071 (1886)).

However, in making its findings relative to enactment of the ADA, Congress found that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. § 12101(a)(7), and continue to be subjected to discrimination in voting. 42 U.S.C. § 12101(a)(3). Congress made such findings after hearing testimony that "people with disabilities have been turned away from the

polling places after they have been registered to vote because they did not look competent." 2 Leg. Hist. 1220 (Nancy Husted-Jensen).

Furthermore, Congress learned that when one witness turned in the registration card of a voter who has cerebral palsy and was blind, the "clerk of the board of canvassers looked aghast and said to me, 'Is that person competent? Look at that signature,'" and then invented a reason to reject the registration. *Id.* at 1219. Additionally, one deaf voter was told that "you still have to be able to use your voice" to vote. Equal Access to Voting for Elderly & Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. 94 (1984) (Equal Voting Hearings).

Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available;" on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." Equal Voting Hearings 45. *See also Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (*citing* additional examples).

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places or voting machines are inaccessible. *See* S. Rep. No. 116 at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Id.*; *see also* Americans with Disabilities Act of 1989: Hearings on S. 933 before the Subcomm. on

the Handicapped and the Senate Comm. on Labor & Human Res., 101st Cong., 1st Sess. 76 (1989) (May 1989 Hearings). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 Leg. Hist. 1745 (Nanette Bowling).

D. Fourth Amendment Rights

The legislative history of the passage of the ADA, demonstrated that persons with disabilities have been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment right to due process and Fourth Amendment protection from unreasonable searches and seizures.

When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 Leg. Hist. 1005 (Belinda Mason). Police also refused to accept a rape complaint from a blind woman because she could not make a visual identification. Task Force Report (NM 1081).[2] A person in a wheelchair was given a ticket and six months probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. *Id.* (VA 1684).

[2] *See* supra footnote 1, describing Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Task Force Report). In *Garrett*, the complete set of Task Force submissions were cited by state and bates stamp number. *See Garrett*, 531 U.S. at 391-424.

Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 Leg. Hist. 1331. A parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though *** he could not make the appointments because he was unable to get accessible transportation." California Att'y Gen., Comm'n on Disability: Final Report 17, 81 (Dec. 1989). Other instances of discrimination revealed in the legislative record included situations where 1) a sheriff threatened persons with disabilities who stop in town due to car trouble, 2 Leg. Hist. 1115 (Paul Zapun); 2) a police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight;" *Id.* at 1197 and 3) six wheelchair users arrested for failing to leave restaurant after manager complained that "they took up too much space." Task Force Report 21.

E. Parenting Rights

This Court has long recognized that the Constitution protects and respects the sanctity of the parent-child relationship. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972). In addition, the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011 (1970). Another government agency refused to authorize a couple's adoption of a child solely because the woman had

muscular dystrophy. Task Force Report (MA 829). "[B]eing paralyzed has meant far more than being unable to walk – it has meant being *** deemed an 'unfit parent'" in custody proceedings. H.R. Rep. No. 485, Pt. 2, at 41. "Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent." 2 Leg. Hist. 1611 n.10 (Arlene Mayerson).

F. Licensing

The hearings on the ADA documented evidence of a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, supra, Pt. 2, at 29. *See also* 2 Leg. Hist. 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); Task Force Report (CA 261) (discrimination in licensing teachers); *Id.* (TX 1549) (state licensing requirements for teaching deaf students include the ability to hear); *Id.* (TX 1528 & 1542) (interpreters and readers not allowed for licensing exams); *Id.* (TX 1543) (blind applicant not allowed to take state chiropractor's exam because she could not read x-ray without assistance).

G. Eighth Amendment Violations

The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994); *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392 (1981). But Congress heard that "their jailers rational[ize] taking away their wheelchairs as a

form of punishment as if that is different than punishing prisoners by breaking their legs." 2 Leg. Hist. 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).

III. Congress Validly Abrogated The States' Eleventh Amendment Immunity In Terms Of Violations Of Fundamental Rights.

Congress validly abrogated state sovereign immunity in Title II with regard to the fundamental rights discussed above. Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631 (2000) (citations omitted). Second, Congress must act in accordance with its enforcement power under Section 5 of the Fourteenth Amendment. *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114 (1996).

A. Congress Made its Intention Clear in the Language of the ADA.

In adopting Title II, Congress clearly stated its intention to abrogate the States' Eleventh Amendment immunity: "A State shall not be immune under the Eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

Therefore, the remaining issue before the Court is whether Title II of the ADA constitutes a valid exercise of Congress' Section 5 power.

B. Congress Acted in Accordance with its Enforcement Power Under Section 5 of the Fourteenth Amendment.

To be valid under Section 5, Congressional enactments "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (*quoting City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). As discussed, Congress, in enacting Title II of the ADA, identified the history of discrimination as to fundamental rights. Congress then sought to remedy discrimination against those fundamental rights by enacting legislation that was "congruent and proportional" in light of the heightened standard of scrutiny attributed to those fundamental rights.

C. Abrogation of States' Immunity Is Congruent and Proportional.

In *Garrett*, this Court found that Title I is not congruent with the Equal Protection Clause because it greatly expands "discrimination" liability by creating a very large new suspect class of plaintiffs. *Popovich*, 276 F.3d at 812. Further, in the *Garrett* decision the majority of this Court established that disability discrimination deserves a rational basis review and that Congress may not go beyond this standard in applying the Equal Protection Clause by imposing new liabilities on the States by creating a new

suspect class. *Id.* This rationale should apply equally to Title I and Title II of the ADA.

The constitutional balance under Title II, however, is quite different. Title II, unlike Title I, encompasses various due process type claims with varying standards and is not limited to Equal Protection. Much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities. Such violations are subject to a more intense scrutiny and persons, regardless of class status, cannot be excluded from voting, participating in court proceedings or raising their children "unless shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322 (1969), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974); *see also Troxel*, 530 U.S. at 65 (plurality opinion); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910 (1988). Congress is well within its express authority under Section 5 to require states to accommodate disabilities as Congress is enforcing the Due Process right rather than expanding it. *Popovich*, 276 F.3d at 815.

In the present case before the Court, Respondent Lane, who is a person with quadriplegia and uses a wheelchair for mobility, found himself in the Polk County Courthouse. *Lane v. Tennessee*, 315 F.3d 680. The court room in which Respondent was to appear was located on the second floor, with no elevators to provide access to the upper floors of the Courthouse. *Id.* The Respondent at a previous hearing faced with this circumstance was forced to drag himself up two flights of stairs. *Id.* On the occasion, which led to this cause of action, the Respondent, when given the choice to either again drag himself to the second floor or endure the prospect of being carried, refused and was subsequently arrested and jailed upon the

court's order. *Id.* Respondent was denied the opportunity to meaningfully participate in an adversary court proceeding. *Id.* Consequently, as evidenced in the instant case, a state's failure to accommodate Plaintiff's disability may greatly increase the risk of error in proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary proceeding. *Popovich*, 276 F.3d at 815.

Congress properly abrogated States' Eleventh Amendment immunity for citizens' fundamental rights. Such an abrogation would be congruent and proportional as Congress was not creating a new suspect class as cited in *Garrett*; or creating new liabilities for the states. Rather, it was merely enforcing rights that already exist for all citizens, due to the heightened scrutiny associated the those rights, that are expressly contained within or implicitly implied in the text of the Constitution.

The Petitioner's action should be barred by the Eleventh Amendment insofar as the action relied on Congressional enforcement of the Equal Protection Clause, however, it should not be barred insofar as any abrogation would rely upon the congressional enforcement for the Due Process Clause. *Popovich*, 276 F.3d at 812.

CONCLUSION

Faced with well-documented incidents of state discrimination against people with disabilities affecting fundamental Due Process rights, Congress enacted a comprehensive and legislative response that recognized the States' central role in the provision of fundamental government functions, such as access to the courts, voting, and the ability to petition government officials.

Title II involves, in part, an area of regulation for which people with disabilities have no options. That is, governments have a central role in providing fundamental government functions, and should strive to ensure that those functions are performed in a manner that does not impede the fundamental rights of its citizens.

Because of the states' central role, a limitation on the ability of people with disabilities to enforce Title II against the States, in terms of pursuing the enforcement and protection of fundamental rights, may substantially diminish Title II's effectiveness. In this limited situation, the Court should grant Congress reasonable latitude in crafting remedies that people with disabilities can use without restriction.

For the foregoing reasons, this Court should find in favor of the Respondents and hold that Congress, pursuant to Section 5 of the Fourteenth Amendment, in enacting Title II of the ADA, validly abrogated the states' sovereign immunity as to issues affecting fundamental due process rights.

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